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Enough Delay On the Spy Bill

Leading newspapers have sharply criticized an administration-supported bill to protect the identities of intelligence agents. In September The Washington Post accused the House of Representatives of taking "a nasty swipe at the First Amendment" when it passed this bill by an overwhelming margin. The Chicago Tribune believes Congress is seeking an excuse "to stifle criticism of the dark side of the U.S. intelligence work." The New York Times said the bill "would indiscriminately suppress reporting that exposes intelligence abuses and stirs reform," and concluded that "outlawing what Louis Wolf does strikes at every reporter and scholar who would publish facts that government prefers to keep concealed."

Such criticism is unfair and inaccurate. There is an obvious distinction between the activities the bill is intended to deter and those of responsible journalists. Louis Wolf's Covert Action Information Bulletin, for example, regularly includes a feature called "Naming Names," which claims to have exposed the secret identities of hundreds of U.S. intelligence officers serving abroad.

The continuing pattern of disclosures by Wolf's publication is intended to neutralize the effectiveness of U.S. intelligence agents abroad by revealing their identities, with apparent disregard for the physical danger to which the agents and their families are necessarily exposed. These disclosures use public speech as a weapon and not as a means of educating or persuading the citizenry.

The Supreme Court has long held that the First Amendment does not absolutely protect statements whose "very utterance inflicts injury" (*Chaplinsky v. New Hampshire*). We are all familiar with Justice Holmes' observation that "falsely shouting fire in a theater and causing a panic" is not protected by the Constitution. In the recent case of *Haig v. Agee*, the Supreme Court rejected the First Amendment claims of ex-CIA agent Philip Agee, whose passport was revoked in part because of "his repeated disclosures of intelligence operations and the names of intelligence personnel." The court concluded that such disclosures "are clearly not protected by the Constitution." In summary, the First Amendment does not preclude legislation that prohibits the systematic exposure of agents' identities under circumstances that pose a clear threat to intelligence activities vital to the nation's defense.

The version of the agents' identities bill supported by the administration is carefully drawn to meet this constitutional standard. The category of prohibited speech includes only information that identifies covert U.S. intelligence agents. The prosecution must prove in each case that the defendant knew he was disclosing a secret agent's identity and that he knew the government was taking active measures to conceal that identity. (The need to satisfy this last element, among others, would preclude prosecution of journalists who have written about Edwin Wilson and Frank Terpil, former CIA employees who have been the subjects of numerous articles because of their alleged ties to Libya.)

Moreover, the bill's key provision requires two additional elements of proof when the defendant has never been a government employee or contractor with access to classified information about agents' identities. First, the offense must occur "in the course of a pattern of activities intended to identify and expose covert agents." Second, the defendant must have "reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." These two elements are designed to provide assurance that the statute applies only to those who make a practice of ferreting out and exposing the identities of U.S. intelligence agents—in short, those in the business of "naming names."

The use of a "reason to believe" standard in this bill has led some critics to assert that investigative reporting about intelligence activities would be "chilled" by the risk of unwittingly violating the law. That is not true. The law would punish only deliberate and knowing efforts to expose the identities of U.S. intelligence agents. The "reason to believe" standard provides an additional test that must be met, so that the law applies only when harm to U.S. intelligence activities is apparent. All of these elements must be proved by the prosecution beyond a reasonable doubt, to the satisfaction of a unanimous jury.

The Senate Judiciary Committee has now amended this bill by replacing the "reason to believe" standard with one requiring "intent to impair or impede" U.S. intelligence activities. The proclaimed purpose of this change was to preclude prosecution of persons who disclose agents' identities for some noble purpose. However, such a change could invite attempts by Covert Action Information Bulletin or other groups to evade the law by proclaiming that their purpose is to stimulate public debate rather than to impair intelligence activities. Therefore, the House-passed version is preferable from the standpoint of enforcement.

Both versions of the agents' identities bill focus narrowly on a particular kind of reprehensible conduct, which our government is entitled to treat as unlawful. Both versions are constitutional and enforceable. Although the administration supports the version passed by the House, this legislation has been delayed long enough, and one version or the other deserves speedy enactment. In a world filled with dangers, such legislation is necessary to protect the men and women of the intelligence community, whose secret work is vital to the nation's security.

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